88-993

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

DANNY MICHAEL LINKOUS,

Petitioner,

v.

NANCY L. LINKOUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

The judgments and orders of the Texas Court of Appeals and the Texas Supreme Court, which dismissed Petitioner's direct and statutorily authorized appeal from a district court judgment, present the following questions on certiorari:

1. Whether, as applied to Petitioner in his direct appeal of a Texas state court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Due Process of Law, contrary to the Fourteenth Amendment to the United States Constitution.

2. Whether, as applied to Petitioner

in his direct appeal of a Texas state court judgment, the scheme of the Texas "cost bond" requirements in civil cases operated to deprive Petitioner of Equal Protection of Law, contrary to the Fourteenth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

Petitioner, DANNY MICHAEL LINKOUS, respectfully requests that a writ of certiorari be issued to review the Judgment of the Supreme Court of Texas, which refused to review an order

dismissing Petitioner's direct appeal, entered by the Court of Appeals of Texas, 14th District, at Houston. A motion for rehearing was denied by the Texas Supreme Court on September 14, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals of Texas dismissing Petitioner's direct appeal, delivered February 18, 1988, appears as Appendix H to this Petition. Petitioner's Application for Writ of Error to the Supreme Court of Texas appears as Appendix I. The order of the Supreme Court of Texas denying the Application for Writ of Error appears as Appendix J. The order of the Supreme Court of Texas denying Petitioner's Motion for Rehearing appears as Appendix K.

JURISDICTION

Pursuant to the Texas Rules of Civil

and Appellate Procedure, Petitioner perfected and took a direct appeal from a Texas divorce judgment to the 14th Court of Appeals of Texas, at Houston. Petitioner filed a statutorily required "cost bond" in the amount of $1000.00. The Texas Court of Appeals, on an ex parte motion of two court reporters who took testimony in the trial court, increased the "cost bond" required of Petitioner to pursue his appeal. Petitioner repeatedly claimed financial inability to post the increased bond. After Petititioner could not comply with the "cost bond" requirements, the Court of Appeals dismissed Petitioner's appeal, and refused his Motion for Rehearing, which alleged deprivation of his rights to Due Process and Equal Protection under the Fourteenth Amendment. On Application for Writ of

Error to the Texas Supreme Court [Appendix I, which again raised the Federal Constitutional claims presented herein] Petitioner's Application was "denied". Petitioner's Motion for Rehearing in the Texas Supreme Court was denied on September 14, 1988.

The Order of the Supreme Court of Texas denying Petitioner's timely Motion for Rehearing was entered on September 14, 1988. This petition is filed within 90 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall. . .deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Rule of Appellate Procedure 46 provides:

> (a) Cost Bond. Unless excused by law, the Appellant shall execute a bond payable to the appellee in the sum of $1000 unless the Court fixes a different amount upon its own motion or any interested officer of the court. If the bond is filed in the amount of $1000, no approval by the court is necessary. . . .
>
> (c) Increase or Decrease in Amount. Upon the court's own motion or motion of any party or any interested officer of the court, the court may increase or decrease the amount of the bond or deposit required. The trial court's power to increase or decrease the amount shall continue for thirty days after the bond or certificate is filed, but no order increasing shall affect

perfecting of the appeal or the jurisdiction of the appellate court. If a motion to increase the amount is granted, the clerk and the official reporter shall have no duty to prepare the record until the appellant complies with the order. If the appellant fails to comply with such order, the appeal shall be subject to dismissal or affirmance under Rule 60. No motion to increase or decrease the amount shall be filed in the appellate court until thirty days after the bond or certificate is filed. In determining the question of whether an appellant's bond or deposit should be increased to more than the minimum amount of $1000, the court shall credit the appellant with such sums as have been paid by appellant on the costs to the clerk of the trial court or to the court reporter."

. . .

(e) Payment of Court Reporters. Even if a bond is filed or deposit in lieu of bond is made, appellant shall either pay or make arrangements to pay the court reporter upon completion and delivery of the statement of facts." [emphasis supplied]

. . .

Texas Rule of Appellate Procedure 60 provides, in relevant part:

> Involuntary Dismissal.
>
> (a) Civil Cases.
>
> (1) If an appeal. . . is subject to dismissal . . . for failure of appellant to comply with any requirements of these rules or any other order of the court, the appellee may file a motion for dismissal. . . . If the ground of the motion is failure to file the transcript, the motion shall be supported by certified or sworn copies of the judgment and the appeal bond or other document perfecting or attempting to perfect the appeal or writ of error.
>
> (b) If it appears to the appellate court that an appeal or writ of error is subject to dismissal for . . . failure to comply with any requirements of these rules or any order of the court, the court may, on its own motion, give notice to all

> parties that the case will be dismissed unless the appellant or any party desiring to continue the appeal or writ of error, files with the court within ten days a response showing grounds for continuing the appeal or writ of error.

Title 2, Texas Government Code, Section 52.046, provides, in relevant part, that a court reporter must:

> "(A)(5) furnish a transcript of the reported evidence or other proceedings, in whole or in part, as provided by this chapter."

Title 2, Texas Government Code, Section 52.047(A) provides:

> "A person may apply for a transcript of the evidence in a case reported by an official court reporter. The person must apply for the transcript in writing to the official court reporter, and the court reporter shall furnish the transcript on payment of the transcript fee."

STATEMENT OF THE CASE

Petitioner and Respondent were divorced in the 247th Judicial District Court of Harris County, Texas, by Decree of Divorce signed on June 20, 1986. Petitioner perfected a direct appeal to the Court of Appeals of Texas, 14th Supreme Judicial District, at Houston. The Court of Appeals dismissed the appeal on February 18, 1988, because Petitioner was unable to post an increased cost bond to obtain a complete statement of facts. Petitioner's Motion for Rehearing was overruled by the Court on March 17, 1988. Petitioner filed an application for Writ of Error in the Texas Supreme Court, which was denied. Petitioner's motion for rehearing in the Texas Supreme Court was

denied on September 14, 1988.

This case was a direct appeal to the Court of Appeals of Texas, 14th District at Houston, from a judgment of divorce which was signed on June 20, 1986, in the 247th Judicial District Court of Harris County, Texas. The Transcript, which was timely filed in the Court of Appeals shows that the Respondent filed her petition for divorce on or about April 4, 1983. Thus, this case has been in the Courts for just about five years. In July, 1984, during the pendency of the divorce action, Petitioner filed for protection under the United States Bankruptcy Laws, Chapter 11, in the United States Bankruptcy Court for the Southern District of Texas, at Houston. In July, 1985, and during the pending divorce proceeding in the trial court, the bankruptcy action was converted

to a Chapter 7 action of full liquidiation of the Petitioner's estate. At all times relevant to the Texas state court appeal involved herein, the bankruptcy action was pending, and in fact it is still pending in the United States Bankruptcy Court for the Southern District of Texas, at Houston.

After the decree of divorce was entered, Petitioner properly perfected his appeal to the Texas Court Appeals by filing a statutory cost bond on September 16, 1986 [Appendix A]. The Transcript required by Texas Rules of Procedure was timely filed. Petitioner properly requested the three court reporters who took the trial to prepare a statement of facts, and offered to pay them as the work was completed. By October 30, 1986, Petitioner had filed a partial statement

of facts prepared by Mr. Clifton Smith, one of three reporters who attended the trial of the case below. Petitioner had made satisfactory financial arrangements with this Court reporter, which enabled him to comply with the Texas Rules of Appellate Procedure in this regard. The other two court reporters, Ms. Sharon Gray and Ms. Lydia Orozco, refused to make similar arrangements with Petitioner, and demanded that Petitioner make a $10,000 deposit with each of them before they would begin their work on the statement of facts. These court reporters were properly requested by Petitioner to prepare their portion of the statement of facts in accordance with the Texas Rules of Civil and Appellate Procedure. When the two court reporters failed and refused to prepare their portion of the statement

of facts without prepayment therefor, Petitioner filed a Petition for Writ of Mandamus in the Court of Appeals. This Petition was denied by the Court of Appeals.

On November 25, 1986, the two court reporters, Sharon Gray and Lydia Orozco, filed in the Texas Court of Appeals a Motion to Increase Cost Bond [Appendix B]. In their verified Motion, the court reporters stated that the statement of facts would be in excess of of 7,500 pages and that the reasonable and necessary cost to prepare a statement of facts of that size is $28,425.

On December 30, 1986, the Texas Court of Appeals entered an Order which increased the amount of the Cost Bond on Appeal to the amount of $125,000, and ordered that the bond be filed on or

before January 29, 1987 [Appendix C]. The December 30, 1986, Order included a bond amount for the attorney ad litem in the trial court, and the court reporter's bond. This Order was entered ex parte, without any opportunity for Petitioner to be heard on the issue of the increase of the "cost bond". This order jeopardized Petitioner's right to appeal the trial court judgment (Rules 46 & 60, Texas Rules of Appellate Procedure).

The time for compliance with the ex parte bond increase order was extended to March 2, 1987, and later to May 29, 1987, by Motions filed by Petitioner, claiming, among other things, that he was financially unable to comply with the cost bond order because of Bankruptcy and other financial direties [Appendix D]. On July 30, 1987, pursuant to Petitioner's Third

Motion for Extension of time, filed on June 15, 1987, the Texas Court of Appeals modified its December 30, 1986, Order reducing the amount of the Cost Bond to the total sum of Twenty-eight Thousand Four Hundred and Twenty-five Dollars ($28,425.00) [Appendix E]. The Court of Appeals also ordered that Petitioner file the additional cost bond on or before October 12, 1987. The Court of Appeals denied Petitioner's assertion of financial inability to comply with the order, without hearing, and even though his affidavit went unchallenged.

By order of November 5, 1987, the Court of Appeals extended the time to file the Cost Bond to December 30, 1987, at noon, with an indication that no extensions would be granted.

On December 30, 1987, Petitioner filed

a Motion to abate the Court's cost bond order of July 30, 1987, because Petitioner, through his attorney, had finally reached a tentative agreement with the attorney representing Ms. Sharon Gray and Ms. Lydia Orozco, for payment of the statement of facts. After filing the Motion to abate, Petitioner's counsel received a letter from Mr. William Ware, attorney for Ms. Gray, setting forth the proposed financial arrangements to obtain the statement of facts.

Upon Petitioner's motion to abate, the Court of Appeals entered an order on January 14, 1988, [Appendix F] which said:

> "This Court will rule on appellant's motion to abate the Court's cost bond order upon receipt of a copy of a signed and verified agreement between appellant, his attorney and the court reporters. In lieu of a copy of said agreement, the

> Court will accept affidavits of Sharon Gray and Lydia Orozco as to their acceptance of said agreement and an estimate of the length of the record and the time needed to file the statement of facts.
>
> It is ORDERED that a copy of such agreement or court reporters' affidavits in lieu thereof must be filed with this Court no later than 5:00 p.m., Tuesday, February 1, 1988." [emphasis supplied]

On February 1, 1988, Ms. Gray and Ms. Orozco, the proponents of the Motion to increase cost bond upon which this case was dismissed, filed in the Texas Court of Appeals, affidavits which acknowledged that they had reached a tentative agreement with counsel for Petitioner to provide a transcription of their portions of the statement of facts, and therefore obviate the necessity for an increased bond.

Nevertheless, on February 18, 1988, the Texas Court of Appeals dismissed Petitioner's appeal, ex parte, without hearing and notice to Petitioner [Appendix G & H]. Petitioner sought to revive the appeal by a motion for rehearing in the Court of Appeals, which was denied. Petitioner filed his Petition for Writ of Error in the Supreme Court of Texas [Appendix I], which was denied [Appendix J]. Likewise, his motion for rehearing in the Texas Supreme Court was denied on September 14, 1988 [Appendix K].

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I.

AS APPLIED TO PETITIONER IN HIS DIRECT APPEAL OF A TEXAS STATE COURT JUDGMENT, THE SCHEME OF THE TEXAS "COST BOND" REQUIREMENTS IN CIVIL CASES OPERATED TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

Petitioner's appeal was dismissed because 1) he could not afford to prepay the cost of the statement of facts, demanded by the two state court reporters; and 2) because he could not afford to post the increased cost bond entered by the Court of Appeals without a hearing and without regard to Petitioner's financial ability to comply. Throughout all of the "extensions" reflected in the Appendix, the fact of Petitioner's pending bankruptcy and the fact of his financial inability to comply with the increased cost bond went unquestioned and unrebutted by any party and by the Texas court of appeals.

(a)

Although there is no Constitutional right to an appeal, if a State has created appellate courts as an integral part of

the system for finally adjudicating the rights of parties, the procedures used in deciding appeals must comport with the demands of the Due Process Clause of the Fourteenth Amendment.

This Court has consistently held that once a state creates adjudicative processes for resolution of claims by private citizens, access to those adjudicative processes cannot be limited, conditioned or withdrawn without comporting with Due Process requirements. Logan v. Zimmerman Bush Co., 455 U.S. 422, 426-427, 430 n. 5, 431-433 (1982). In Evitts v. Lucey, 469 U.S. 387 (1985), the Court held that, having established an appellate system, a state must "act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause" -- so as to assure that the appellate access is

not rendered "a meaningless ritual". The Court rejected the contention that because a state "need not establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it chooses to have such a system." "[T]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." Id. at 400-401. Rather, Evitts held that once a right to appellate access is granted, the state must "offer each defendant a fair opportunity to obtain an adjudication of his appeal. 469 U.S. at 405. In other words, each individual has a due process right to be free from irrational impediments to meaningful appellate access and cannot be deprived of that right simply because the challenged state scheme

might be reasonable - in its general application.

(b)

The basic elements of Due Process established by this Court were ignored by the Texas courts in Petitioner's direct appeal.

As the Court recognized in Boddie v. Connecticut, 401 U.S. 371 (1971), precedent for the application of the Due Process Clause to persons seeking access to the courts was limited, since most due process decisions involved rights of defendants who have been "forced" into the judicial system. 401 U.S. at 375. As presented here, Petitioner's case involves his right to access to the Texas appellate court, and thus the Due Process principles

acknowledged in **Boddie** are equally applicable here.

First, Due Process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a "meaningful opportunity to be heard". Id. at 377. Thus, what the Constitution requires is an opportunity, granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case, before a citizen can be deprived of any significant property interest.

Second, a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right, even though its general validity as a measure enacted in the

legitimate exercise of state power is beyond question. Thus, the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals.

Third, just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Petitioner does not contend that the Texas cost bond requirements are facially contrary to the Fourteenth Amendment. Petitioner does contend that in application, and in particular application to him in his direct appeal, the cost bond scheme violates Due Process.

This Court has recently reiterated that "as applied" adjudication is the "preferred course" of constitutional decisionmaking "since it enables courts to avoid making unnecessarily broad constitutional judgments." City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985). See also, Parham v. J.R., 442 U.S. 584 (1978); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Petitioner contends that the application of the cost bond requirements under Texas law to Petitioner's case irrationally and

arbitrarily deprived Petitioner of his right to a meaningful appeal.

As in Boddie, the Texas appellate courts' refusal to "admit" Petitioner to its courts, must be regarded as the equivalent of denying him an opportunity to be heard upon his claimed right to a reversal of a state court judgment, and in the absence of a sufficient countervailing justification for the State's action, a denial of due process. Petitioner was denied any type of hearing or opportunity to be heard on the motion of the court reporters to increase the bond [in fact, Petitioner had successfully obtained a third of the statement of facts from Mr. Clifton Smith, under identical financial arrangements proposed to the two uncooperative court reporters]; the Texas court of appeals, ex parte, increased his

bond, without hearing, or even an opportunity to contest the validity or merits of the court reporters' motion; and when Petitioner uneqivocally established his inability to comply with the increased cost bond order, which was not disputed by anyone, the Texas court of appeals denied Petitioner's request for relief from the oppressive cost bond order. Ultimately, Petitioner was foreclosed from appellate review of the decree of divorce.

States such as Texas provide access to appellate courts precisely because they recognize that trial court adjudication carries a "risk of erroneous deprivation" of life, liberty, or property. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Due Process Clause therefore prohibits states from imposing irrational and arbitrary requirements on appellate

opportunities they choose to make available. [It should be noted here that the record in the Texas court of appeals, in the statement of facts provided by Mr. Smith, revealed that Petitioner was involuntarily without counsel during approximately 1/2 of his divorce trial, and that because of serious illness of his trial counsel, he was forced to proceed with the remainder of the trial pro se. It is not surprising that Petitioner wanted to vigorously pursue his appellate rights.]

(c)

The Texas cost bond requirement is a prerequisite for an appeal in a civil case.

In this case, unlike the supersedeas

bond requirements involved in Pennzoil Co. v. Texaco, Inc., 106 S.Ct. 1519 (1987), the cost bond provisions of the Texas appellate scheme are prerequisites to the prosecution of a civil appeal in Texas. Texas Rules of Appellate Procedure 40 & 46. Although a state is not bound, by reason of providing an appellate process, also "to provide for a suspension of the judgment" during the appeal, Louisville & N.R. Co. v. Stewart, 241 U.S. 261 (1916), "a cost bond requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371 (1971). In this case, Petitioner was foreclosed from exercising his right to appeal by the application of the cost bond requirements to him. Such application made it

impossible for him to properly take an appeal, and resulted in an absolute bar to an opportunity to present his appeal.

II.

AS APPLIED TO PETITIONER IN HIS DIRECT APPEAL OF A TEXAS STATE COURT JUDGMENT, THE SCHEME OF THE TEXAS "COST BOND" REQUIREMENTS IN CIVIL CASES OPERATED TO DEPRIVE PETITIONER OF EQUAL PROTECTION OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

(a)

Petitioner unequivocally demonstrated his financial inability to comply with the increased cost bond order.

This Court has recognized that a state could not constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in Court, because the ability to pay costs in advance bears no rational relationship

to a defendant's guilt or innocence, and could not be used as an excuse to deprive a defendant of a fair trial. Griffin v. Illinois, 351 U.S. 12, 17 (1956). Griffin held that there is no "meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have enough money to pay costs in advance.

The Equal Protection principles of Griffin v. Illinois have been applied to appellants in civil cases, Lindsey v. Normet, 405 U.S. 56 (1972). Those tenets apply here. The question in Griffin was whether Illinois, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, may administer this writ of error statute in criminal

cases so as to deny adequate appellate review to the poor while granting it to all others. As in Petitioner's case here, the appellants in Griffin filed motions alleging that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute the appeal". As in Petitioner's case here, Griffin and Crenshaw's allegations were not denied or disputed by by any party in interest. In Griffin, as here, the motions were denied without a hearing. And, as it is unarguable in Petitioner's case here, the Griffin petitioners needed a transcript to get adequate appellate review of their alleged trial errors.

This Court has invalidated state rules giving free transcripts only to defendants who could convince the trial judge that

justice will thereby be promoted, Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); that required indigent defendants to pay a fee before filing notice of appeal from a conviction, Burns v. Ohio, 360 U.S. 252 (1959); that allowed a meaningful appeal only if the the public defender requested a transcript, Lane v. Brown, 372 U.S. 477 (1963); that provided for a free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivilous, Draper v. Washington, 372 U.S. 487 (1963); and has required that an indigent be furnished a free transcript of a state habeas corpus hearing for use on appeal from a denial of habeas corpus, Long v. District Court of Iowa, 385 U.S. 192 (1966); that an indigent prisoner denied relief in state habeas proceeding

is entitled to free transcript of proceeding even though a de novo application could be filed in a higher state court without assigning errors or referring to testimony, Gardner v. California, 393 U.S. 367 (1969); and that an indigent defendant is entitled to free transcript of preliminary hearing for use at trial, even though both defendant and his counsel were present at the preliminary hearing, Roberts v. LaVallee, 389 U.S. 40 (1967).

Lindsey v. Normet, supra, invalidated an Oregon appellate requirement that an appellant in a FED action post a bond in twice the amount of rental value of the premises. Essentially, the Court said that in order for appellate bond rules to comport with Equal Protection, such rules must be reasonably tailored to achieve the

ends sought to be protected, and they must be uniformly and nondiscriminatorily applied. And, the opportunity to appeal cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, 405 U.S. 56 (1972); Griffin v. Illinois, 76 S.Ct. 585 (1956).

(b)

The Texas Court of Appeals refused, in Petitioner's case, to enforce Texas precedent against the court reporters.

Texas courts have consistently held that the statute governing court reporters and the preparation of a statement of facts imposes a mandatory duty on the court reporter to prepare the statement of facts on request, and that the court reporter has no right to require

prepayment before preparing the statement of facts. Alexander v. Bowens, 581 S.W.2d 714 (Tex. Civ. App. - Dallas, 1979 no writ); Volpe v. Stephens, 589 S.W.2d 809 (Tex. Civ. App. - Dallas, 1979). Texas courts have also held that mandamus will issue to compel performance of this duty. Fine v. Page, 572 S.W.2d 577 (Tex. Civ. App. - Eastland, 1978); City of Engleside v. Johnson, 537 S.W.2d 145 (Tex. Civ. App. - Corpus Christi, 1976).

When the two uncooperative court reporters refused to make arrangements with Petitioner for payment of the statement of facts upon completion, as they were required to do under Texas law, Petitioner sought to enforce their statutory obligations by writ of mandamus in the 14th Court of Appeals. The Texas Court of Appeals refused to enforce this

duty with respect to Petitioner's case, and thereafter entertained the two court reporter's motion to increase the bond. It is obvious that Petitioner's case was treated differently than other cases, see cases cited in the foregoing paragraph. This is particularly apparent because Petitioner had successfully filed a third of the statement of facts, prepared by another court reporter, before the Motion to Increase the Bond was filed. The court of appeals, without any requirement of a showing by the court reporters that they could not perform their statutory duty, and without hearing on Petitioner's ability to comply, increased the cost bond. This, Petitioner contends, violates Equal Protection of the law, and the Texas court of appeals administered the cost bond statute as to deny adequate appellate

review to Petitioner, while granting it to others. Griffin v. Illinois, supra.

III.

REASONS FOR ALLOWANCE OF THE WRIT

The Texas Court of Appeals and the Texas Supreme Court rejected Petitioner's claims that, as applied to him, the cost bond provisions of the Texas Rules of Appellate Procedure violated not only the Due Process and Equal Protection Clauses of the federal constitution, but also claims that the bond prerequisites violated the "open courts" provision of the Texas Constitution. Art. I, Section 13, Texas Constitution [See Petitioner's Application for Writ of Error to the Texas Supreme Court, Appendix I]. The Texas Court of Appeals also refused to entertain

Petitioner's repeated claims of financial inability to comply with the increased cost bond order [See, Opinion of the Court of Appeals, February 18, 1988, Appendix H, p. A-31].

The Court, in Pennzoil, highlighted the following as an important reason for its holding that abstention was required:

> "[T]o avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.' [citations omitted]. This concern has special significance in this case. Because Texaco chose not to present to the Texas courts the constitutional claims asserted in this case, it is impossible to be certain that the governing Texas statutes and rules

> actually raise these claims. Moreover, the Texas Constitution contains an 'open courts' provision, Art. I, Sec. 13, that appears to address Texaco's claims more specifically that the Due Process Clause of the Fourteenth Amendment. Thus, when this case was filed in Federal Court, it was entirely possible that the Texas courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions Texaco raises in this case."

The footnote to the above illustrates the important questions raised herein and the reasons why the Writ should be granted:

> 11. See, LeCroy v. Hanlon, 713 S.W.2d 335, 340-341 (Tex. 1986) ("The open courts provision must have been intended to provide rights in addition to those in the due process provision or the former would be surplusage. Furthermore, the due process provision's general guarantees contrast with the open courts provision's specific guarantee of a right of access to the courts"); id., at 338 (noting that the Texas Supreme Court 'has been in the mainstream' of the movement of 'state courts. . . to look to their own constitutions to

protect individual rights') (citing, inter alia, Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (1977)). See also, Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890) (invalidating a previous supersedeas bond statute because it effectively prevented certain parties from securing an appeal).

The relevance of the open courts provision to this case is not limited to its indication that the Texas courts may well accept Texaco's challenge on state constitutional grounds, obviating the need for consideration of the federal constitutional questions. As we explain infra, at 1527-1528, this provision also undercuts Texaco's claim that no Texas court was open to hear its constitutional claims."

It is therefore apparent in the case and questions presented by this Petition:

1. That, unlike Texaco, Petitioner presented the constitutional claims presented herein to the Texas court of appeals and the Texas Supreme Court;

2. That it is certain now that the

governing Texas statutes and rules actually raise these claims;

3. That it is certain that that Texas courts wholly refused to resolve the issues raised herein on state statutory or constitutional grounds without reaching the federal constitutional questions that Petitioner raises in this case;

4. That Texas refused to apply its more narrow "open courts" guarantee to Petitioner's case, and rejected the broader Due Process and Equal Protection assertions made by Petitioner;

5. That Texas went ashore in the movement of state courts to look to their own constitutions to protect this Petitioner's individual rights;

6. That Texas closed its courts to Petitioner to hear his federal constitutional claims;

7. That determination of the federal constitutional questions presented is not unwarranted, but rather necessary.

8. That the ultimate determination of the federal constitutional questions presented herein will not be advisory only to Texas, and will be binding on state courts, not to be discredited at any time; and

9. That the litigation underlying this decision will not be meaningless, but will rectify constitutional deprivations as to this Petitioner, and those that follow in his footsteps.

CONCLUSION

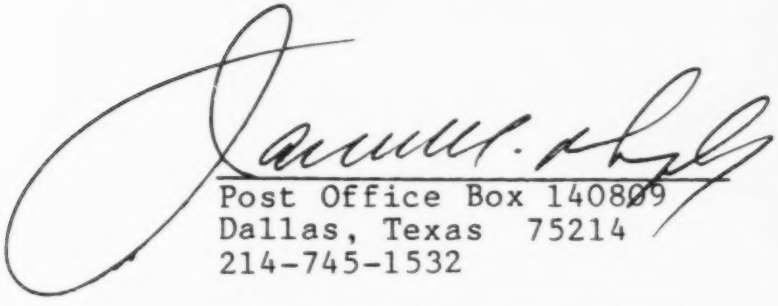
Because the Texas state courts have decided an important question of federal constitutional law which has not been, but

should be settled by this Court, and because the Texas Courts have decided a federal question in a way in conflict with applicable decisions of this Court, the Writ should be granted.

* * * * * * * * * * *

Respectfully submitted,

JAMES M. MURPHY



Post Office Box 140809
Dallas, Texas 75214
214-745-1532

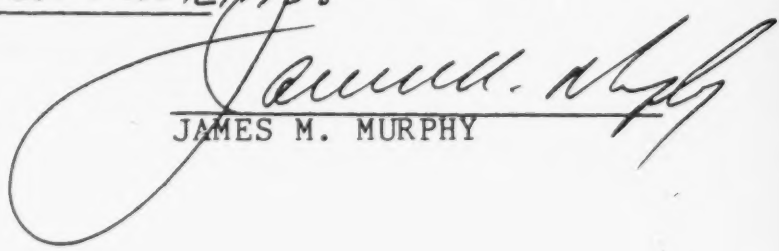
ATTORNEY FOR PETITIONER

PROOF OF SERVICE

I certify that a true copy of the

foregoing Petition for Writ of Certiorari was sent by United States Mail, postage pre-paid, to Mr. Donn C. Fullenweider, Haynes & Fullenweider, 4300 Scotland, Houston, Texas, 77007, and to the Clerk of the Texas Supreme Court, P.O. Box 12248, Capitol, Austin, Texas 78711, on the 13th day of December, 1988.

DATED: December 12, 1988



JAMES M. MURPHY

88-993

Supreme Court, U.S.
FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

DANNY MICHAEL LINKOUS,

Petitioner,

v.

NANCY L. LINKOUS,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES M. MURPHY
P.O. BOX 140809
Dallas, Texas 75214
214-745-1532

ATTORNEY FOR PETITIONER

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APPENDIX A

* * *

LAWYERS SURETY CORPORATION

1221 River Bend Drive-Dallas, Texas 75247

Suit No. 83-28196 Bond No. COA 317866

APPEAL BOND TO COURT OF CIVIL APPEALS

IN THE MATTER OF THE MARRIAGE OF NANCY L. LINKOUS AND DANNY MICHAEL LINKOUS	IN THE 247TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, STATE OF TEXAS

WHEREAS, on the 20th day of June, 1986, in the above styled and numbered cause pending in the aforesaid Court there was rendered by said Court an ORDER, JUDGMENT, AND DECREE (which is duly entered in Volume ___ beginning at Page ____ of the Minutes of said Court, and which is made a part hereof by reference)

from which the undersigned APPELLANT has taken an appeal to the Court of Civil Appeals for the 1st/14th Supreme Judicial District of Texas:

NOW THEREFORE, we, said Appellant DANNY MICHAEL LINKOUS as Principal, and LAWYERS SURETY CORPORATION as Surety, acknowledge ourselves bound to pay to Ray Hardy, District Clerk in and for Harris County Texas and/or his successors in office.

Appellee _____ the sum of $1,000.00.

CONDITIONED: That the said Principal, Appellant, shall prosecute said appeal or writ of error with effect and shall pay all costs which have accrued in the trial court and the cost of the statement of facts and transcript.

WITNESS OUT HANDS this 16th day of September, A.D., 1986.

DANNY MICHAEL LINKOUS

BY: /S/_____
Principal

LAWYERS SURETY
CORPORATION
(Surety)

BY: /S/_____
Attorney-in-Fact
Estela Leija

(SEAL)

(Filed: September 16, 1986)

APPENDIX B

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

MOTION TO INCREASE COST BOND

TO THE HONORABLE COURT OF APPEALS

IN AND FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS:

COME NOW SHARON GRAY and LYDIA OROZCO,

both Certified Shorthand Reporters in and for the State of Texas, and file this their Motion to Increase Cost Bond and for cause would show as follows:

I.

The above-captioned and -entitled appeal is from a jury trial which lasted six (6) weeks.

II.

The above Court Reporters reported the trial for two (2) weeks each. Two other weeks were taken by another reporter not presently involved in this motion.

III.

A request for a Statement of Facts has been made upon the Court Reporters for the purpose of the Appeal from the Judgment of the Trial Court, which is now before this Honorable Court.

IV.

The statement of facts has been estimated by SHARON GRAY to be in excess of seven thousand five hundred (7,500) pages.

V.

The reasonable and necessary cost for preparing such Statement of Facts in the Houton, Harris County, area is twenty-eight thousand four hundred twenty-five dollars ($28,425.00).

VI.

The Cost Bond of Two Thousand Dollars ($2,000.00) previously filed is grossly and wholly inadequate to assure the Court Reporters' expenses incurred in this matter.

VII.

In excess of thirty (30) days have elapsed since the filing of the appeal bond in this matter, thus the Appeals

Court has jurisdiction in this matter pursuant to Rule 354(c).

Respectfully submitted,

/s/_____
SHARON GRAY
Deputy Official Court Reporter
1502 Lynnview
Houston, Texas 77055
(713) 468-5565
Certificate No. 485

/s/_____
LYDIA OROZCO
Deputy Official Court Reporter
Certificate No. 991

VERIFICATION
(Omitted)

DATED: November 24 & 25, 1986.

APPENDIX C

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

Order filed December 30, 1986.

ORDER

This is an appeal from a decree of divorce signed June 20, 1986. On September 16, 1986, appellant filed a one thousand ($1,000) dollar appeal bond with

the Harris County District Clerk. On November 25, 1986, certified shorthand reporters Sharon Gray and Lydia Orozco filed a motion to increase the cost bond in this appeal. In their verified motion, the court reporters state the statement of facts is in excess of 7,500 pages and that the reasonable and necessary cost to prepare a statement of facts of that size is twenty-eight thousand four hundred twenty-five dollars ($28,425).

The record before the court also indicates that the costs in the court below included the fees of the guardian/attorney ad litem, Donald Peter Fogo, in the amount of ninety-nine thousand, eight hundred and sixty dollars ($99,860).

Where in a divorce action, the court appoints a guardian ad litem to represent

the interest of the minor children, the trial court does not abuse its discretion in taxing the guardian ad litem costs against the appellant. TEX. FAM. CODE ANN Sec. 3.65; Peterson v. Peterson, 502 S.W.2d 178 (Tex. App.-Houston [1st Dist.] 1973, no writ).

On the court's own motion, or on motion of any interested officer of the court, this Court may increase or decrease the amount of bond or deposit required. TEX. R. APP. P. 46(c).

If the motion to increase the amount of the bond is granted, the court reporter shall have no duty to prepare the record until the appellant complies with the order. TEX. R. APP. P. 46(c).

This Court orders an additional cost bond filed with the Harris County District Clerk within thirty days of issuance of

this order in the amount of one hundred twenty-five thousand dollars ($125,000).

All motions received or pending in this Court which are concerned with the statement of facts in this case will not be heard until the additional cost bond is filed below, or until time to file the additional cost bond has expired.

Upon notice of filing of the additional cost bond, this Court will extend the time for filing the statement of facts to such date as will give the court reporters reasonable time to prepare the statement of facts.

PER CURIAM

Judgment rendered and Order filed December 30, 1986.

Publish - TEX. R. APP. P. 90.

Panel consists of Justices Junell, Draughn and Ellis

APPENDIX D

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

AFFIDAVIT OF INABILITY TO PROVIDE
COST BOND FOR APPEAL

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME, the undersigned authority,

on this day personally appeared Danny Michael Linkous, known to me to be the person whose signature appears hereinafter, who, after being by me duly sworn, stated upon his oath as follows:

"My name is Danny Michael Linkous. I have no ability to pay for or provide the cost bond that the 14th Court of Appeals has set at $125,000.00 by its order of December 30, 1986. I have tried to get major bonding companies to write this bond for me. Most major bonding companies won't even consider writing the cost bond because of my financial condition and bankruptcy. Two bonding companies, Marsh and McLennan and The Lovett Agency, rejected my application for bond after considering it. I have no money to pay for the cost bond and I have no assets to sell to obtain money to pay the bond. I have taken no salary from my medical practice and it is virtually bankrupt with outstanding debts of over $100,000.00. There is over $50,000.00 in taxes owed by my medical practice. The salaries

of my employees can't even be met and I can't borrow money on the future earning power of the practice or the office equipment and fixtures. I have exhausted every source of loans or advances from my banks, personal friends and family in my attempt to obtain money for this cost bond. There is absolutely no way, other than the possibility that the United States Bankruptcy Court will sponser the cost bond from my Chapter 7 estate, that I can come up with the money to provide this cost bond. Recently, I was confined in the Harris County Jail for failure to pay the full amount of child support and it took thirty two days of jail time before one friend finally loaned me the $2950.00 to get out of jail. This was the last chance to obtain money from any source that I know of. All of my personal assets are in the possession of the bankruptcy trustee and I have formally applied to the Bankruptcy Court for this Cost Bond. I am on the verge of being removed from my medical practice because of the negative effects that my jail confinement has had on my practice and reputation. My ability to continue to practice medicine in this area of Texas

or any other area of the United States is seriously hampered. I expect to be suspended from the practice of medicine by the Medical Board because of the jail confinement and the destruction of my reputation by this legal and judicial harassment and malicious prosecution that has occurred tor me over the past three years of the divorce.

I repeat that I have no funds or ability to obtain funds to provide the cost bond. I have tried every possible means within my knowledge and imagination to obtain the necessary funds for this cost bond. I am being sued by several people, personally and professionally, for past debts which I am unable to pay. My bankruptcy attorney recently dismissed himself from my case because of my inability to pay his fees and expenses. I have been unable to pay my divorce counsel in one and one-half years and he is just helping me in hope that someday I'll be able to pay him. My family has no means or ability to assist me further as they have given all that they can in the past. I am destitute to the point that I have had to sell my car and watch to pay the amount of

support that I have been paying. I have only a few clothes which are not worth more than a few hundred dollars. I am a pauper at this time.

/s/_____
DANNY MICHAEL LINKOKUS,
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of June, 1987.

Print: Bonnie L. Titus

My Commission Expires:

October 22, 1988

Signed: /s/_____
Notary Public in and for
THE STATE OF TEXAS

(Filed: June 15, 1987)

APPENDIX E

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

Order filed July 30, 1987.

ORDER

This is an appeal from a decree of divorce signed June 20, 1986. On September 16, 1986, appellant filed a one thousand ($1,000) dollar appeal bond with

the Harris County District Clerk. On November 25, 1986, certified shorthand reporters Sharon Gray and Lydia Orozco filed a motion to increase the cost bond in this appeal. In their verified motion, the court reporters state the statement of facts is in excess of 7,500 pages and that the reasonable and necessary cost to prepare a statement of facts of that size is twenty-eight thousand four hundred twenty-five dollars ($28,425).

The record before the court also indicates that the costs in the court below included the fees of the guardian/attorney ad litem, Donald Peter Fogo, in the amount of ninety-nine thousand, eight hundred and sixty dollars ($99,860). On December 30, 1986, this Court issued an order increasing the amount of the cost bond to one hundred

twenty-five thousand ($125,000) to cover the cost of the statement of facts and guardian/attorney ad litem fees. The bond was to be paid on or before January 29, 1987.

Appellant filed three motions to extend time to file the cost bond.

On June 15, 1986 [sic], appellant asked this Court to:

1. Extend the time to file the cost bond until December 31, 1987, or until Federal Bankruptcy Court enters an order on appellant's application for cost bond.

2. Enter an amended order modifying our order of December 30, 1986, by excluding the guardian/attorney ad litem fees from the cost bond and thereby reducing the amount of the cost bond required by this Court.

3. Alternatively, appellant asked

that he be allowed to proceed with his appeal as a pauper and be provided a free statement of facts.

Pursuant to Rule 46(c) TEX. R. APP. P., this Court modified our December 30, 1986, order and grants appellant's motion in part. Appellant is ordered to file an additional cost bond with the Harris County District Clerk in the amount of twenty-eight thousand four hundred and twenty-five ($28,425) dollars on or before October 12, 1987.

Appellant's motion for alternative relief is denied.

All motions received or pending in this Court which are concerned with the statement of facts in this case will not be heard until the additional cost bond is filed below, or until time to file the additional cost bond has expired.

Upon notice of filing of the additional cost bond, this Court will extend the time for filing the statement of facts to such date as will give the court reporters reasonable time to prepare the statement of facts.

PER CURIAM

Judgment rendered and Order filed July 30, 1987.

Do Not Publish - TEX. R. APP. P. 90.

Panel consists of Justices Junell, Ross A. Sears and Draughn.

APPENDIX F

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

Order filed January 14, 1988

ORDER

On December 30, 1987, appellant filed a motion to abate the Court's cost bond order of July 30, 1987. The motion stated that appellant and the court reporters

Sharon Gray and Lydia Orozco had reached a tentative agreement whereby appellant could arrange for payment for the statement of facts upon completion and delivery.

This Court will rule on appellant's motion to abate the Court's cost bond order upon receipt of a copy of a signed and verified agreement between appellant, his attorney and the court reporters. In lieu of a copy of said agreement, the court will accept affidavits of Sharon Gray and Lydia Orozco as to their acceptance of said agreement and an estimate of the length of the record and the time needed to file the statement of facts.

It is ORDERED that a copy of such agreement or court reporters' affidavits in lieu thereof must be filed with this

Court no later than 5:00 p.m., Tuesday, February 1, 1988.

If such agreement or court reporters' affidavits are not filed by 5:00 p.m. Tuesday, February 1, 1988, the Court will rule upon the appellee's motion to dismiss the appeal.

PER CURIAM

Order filed January 14, 1988

DO NOT PUBLISH - TEX. R. APP. P. 90

Panel consists of Justices Junell, Sears and Cannon.

APPENDIX G

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

February 18, 1988

JUDGMENT

On this day came on to be heard appellee's motion to dismiss the appeal from the judgment signed and entered by

the court below on June 20, 1986.

The motion having been considered and found meritorious, it is ordered and adjudged that the appeal be and is dismissed.

It is further ordered that all costs incurred by reason of this appeal be paid, jointly and severally, by the appellant, Danny Michael Linkous, and his surety, Lawyers Surety Corporation. It is further ordered that this decision be certified below for observance.

APPENDIX H

* * *

IN THE
COURT OF APPEALS OF TEXAS
14TH SUPREME JUDICIAL DISTRICT
AT HOUSTON

NO. C-14-86-729-CV

DANNY MICHAEL LINKOUS,
Appellant,

v.

NANCY L. LINKOUS,
Appellee.

Dismissed and Opinion filed February 18, 1988.

OPINION

This is an appeal from a judgment in a divorce suit. Judgement was signed June 20, 1986. On September 16, 1986,

appellant timely filed his appeal bond in the amount of $1,000.00. The transcript was timely filed. On October 30, 1986, this Court ordered filed a partial statement of facts and granted an extension of time to November 29, 1986, to file the remainder of the statement of facts. Appellant did not make arrangements satisfactory to Sharon Gray and Lydia Orozco, the two court reporters who had reported the remainder of the proceedings in the trial of the case, to ensure they would be paid for the remainder of the statement of facts upon completion and delivery. On November 25, 1986, said reporters filed a verified motion requesting the Court to increase the cost bond on appeal to an amount sufficient to protect them. The court reporters showed in their motion that the

remainder of the statement of facts would be in excess of 7,500 pages and the reasonable and necessary cost to prepare same would be $28,425.00.

On December 30, 1986, the Court granted the court reporters' motion and increased the cost bond by the amount of $125,000.00. This included an amount sufficient to protect the court reporters and an amount sufficient to protect the fee of Don Fogo, who had been appointed guardian/attorney ad litem for the minor children of the parties and whose fee of $99,860.00 had been taxed and adjudged as part of the court costs. The Court ordered that the increased cost bond be filed by January 29, 1987. Time for filing the increased cost bond was extended by the Court, first to March 2, 1987, and later to May 29, 1987.

On June 15, 1987, appellant filed three motions pertaining to the cost bond, asking the Court to take one of the following actions:

> 1. extend the time to file the cost bond until December 31, 1987, or until federal bankruptcy court entered an order on appellant's application for authority from that court to use funds for the cost bond; or
>
> 2. enter an amended order modifying our order of December 30, 1986 by excluding the guardian/attorney ad litem fees from the cost bond and thereby reduce the amount of the cost bond required by the Court; or
>
> 3. alternatively, allow appellant to proceed with this appeal as a pauper and be provided a free statement of facts.

On July 30, 1987, the Court granted appellant's motions in part and denied his motion for alternative relief. Pursuant

to Rule 46(c) Tex. R. App. P., the Court modified the December 30, 1986 order by reducing the additional amount required for the cost bond to $28,425.00. This additional cost bond was ordered to be filed on or before October 12, 1987.

On October 27, 1987, appellant filed his fourth motion for extension of time to file the additional cost bond. The Court granted that motion and extended the time for filing the increased bond to December 30, 1987, with a notation that no further extensions would be granted.

On December 30, 1987 appellant filed a motion to abate the Court's cost bond order of July 30, 1987, asserting that appellant had a tentative agreement with the two court reporters for preparation or and payment for the remainder of the statement of facts. In that motion

appellant continued to assert his inability to furnish the cost bond required by the Court for financial reasons, including the pendency of the ongoing bankruptcy proceedings against appellant. [emphasis supplied]

On January 13, 1988, appellee filed a motion to dismiss appeal because of appellant's failure to file the increased cost bond as order by the Court.

On January 14, 1988, this Court issued an order including the following:

> "This Court will rule on appellant's motion to abate the Court's cost bond order upon receipt of a copy of a signed and verified agreement between appellant, his attorney and the court reporters. In lieu of a copy of said agreement, the Court will accept affidavits of Sharon Gray and Lydia Orozco as to their acceptance of said agreement and an estimate of the length of the record and the time needed to file the

statement of facts.

Said order of January 14, 1988, also provided that (1) a copy of such agreement or court reporters' affidavits in lieu thereof must be filed with the Court no later than 5:00 p.m. on February 1, 1988, and (2) if such agreement or court reporters' affidavits are not filed by 5:00 p.m. on February 1, 1988, the Court will rule on appellee's motion to dismiss the appeal.

On February 1, 1988 affidavits of Sharon Gray and Lydia Orozco were filed in this Court. Said affidavits contain the fillowing statements under oath:

> 1. "On January 29, 1988, Sharon Gray and Lydia Orozco reached tentative agreement to provide transcription of the Statement of Facts of No. 83-28190 with Mr. James Murphy, Counsel for Appellant.

2. "On January 29, 1988, documents were forwarded by Federal Express (See Exhibit A) to Dallas, Texas. Due to misadventure by said common carrier, documents were not delivered to Mr. Murphy's office.

3. "Within 48 hours of this date, Sharon Gray and Lydia Orozco should be able to file an executed contract between all parties mentioned with the Honorable Fourteenth Court of Appeals for compliance with their order of January 14, 1988.

On February 4, 1988, the following contract was filed in this Court:

CONTRACT

1. First deposit is $2,500.00 to be payable to the J.V. O'Sullivan Trust Account, administered by William Ware, Esquire. When the $2,500.00 is exhausted in terms of work product, each $1,500.00 increment is to be paid until Ms. Gray's portion of the Statement of Facts of 83-28196 is completed.

2. In return for the above payments for services, Ms. Gray promises to produce a true, complete and accurate Statement of Facts of her portion of the above cause.

February 4, 1988

/s/ Sharon Gray, CSR

/s/ James A. Murphy
Attorney for Appellant

Also on February 4, 1988, there was filed in the Court a contract identical to that quoted just above, signed by Lydia Orozco and James A. Murphy, covering Lydia Orozco's part of the statement of facts. Said affidavits and contracts do not comply with this Court's order of January 14, 1988. They do not contain any statement by the court reporters concerning the amount of time needed for preparation of the remainder of the statement of facts. The contracts are not

signed by appellant, as well as his attorney, and are not verified. The contracts are extremely vague and the Court is unable, from these documents, to even guess the date that the remainder of the statement of facts will be filed.

This Court has given appellant far too much time to file a statement of facts in this case and to file the increased cost bond heretofore ordered by this Court. Because the appellant still has not filed the increased cost bond on appeal in the amount of $28,425.00, and has not filed the remainder of the statement of facts or otherwise complied with this Court's order of January 14, 1988, appellee's motion to dismiss the appeal is hereby granted and the appeal is dismissed.

PER CURIAM

Judgment rendered and Opinion filed February 18, 1988.

Do not publish - Tex. R. App. P. 90.

Panel consists of Justices Junell, Ross A. Sears and Cannon

APPENDIX I

* * *

IN THE
SUPREME COURT OF TEXAS
AT AUSTIN

NO. C-7509

DANNY MICHAEL LINKOUS,
Petitioner,

v.

NANCY L. LINKOUS,
Respondent.

APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

DANNY MICHAEL LINKOUS, Petitioner, pursuant to Rules 130 & 131, Texas Rules of Appellate Procedure, submits the following Application for Writ of Error,

complaining of error in the trial court and the Court of Appeals, which Petitioner deems reversible:

NAMES OF ALL PARTIES

The following is a complete list of all parties, so that the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case:

Petitioner: DANNY MICHAEL LINKOUS

Attorney for Petitioner: JAMES M. MURPHY

Respondent : NANCY L. LINKOUS

Attorney for Respondent: DONN C. FULLENWEIDER

Attorney ad Litem: DONALD PETER FOGO

STATEMENT OF THE CASE

Petitioner and Respondent were divorced in the 247th Judicial District

Court of Harris County, Texas, by Decree of Divorce signed on June 20, 1986. Petitioner perfected a direct appeal to the Court of Appeals of Texas, 14th Supreme Judicial District, at Houston. The Court of Appeals dismissed the appeal on February 18, 1988, because Petitioner was unable to obtain a complete statement of facts. Petitioner's Motion for Rehearing was overruled by the Court on March 17, 1988. In this Application for Writ of Error, Petitioner claims that the Court of Appeals erred by dismissing Petitioner's appeal.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction under Texas Government Code, ¶ 22.001(a) (3) & (6).

STATEMENT OF THE POINTS OF ERROR

Point of Error One

THE COURT OF APPEALS ERRED IN DISMISSING PETITIONER'S DIRECT APPEAL. [CT. APP. OPINION 2/18/88]

BRIEF OF THE ARGUMENT

Statement of Facts

This case was a direct appeal to the Court of Appeals of Texas, 14th District at Houston, from a judgment of divorce which was signed on June 20, 1986, in the 247th Judicial District Court of Harris County, Texas. The Transcript which was timely filed in the Court of Appeals shows that the Respondent filed her petition for divorce on or about April 4, 1983. Thus, this case has been in the Courts for just about five years. In July, 1984, during the pendency of the divorce action, Petitioner filed for protection under the United States Bankruptcy Laws, Chapter 11. In about July, 1985, the Bankruptcy proceeding was converted to a Chapter 7

action of full liquidiation of the Bankrupt estate. The Bankruptcy action is still pending in the United States Bankruptcy Court for the Southern District of Texas, at Houston.

Petitioner properly perfected his appeal to the Court Appeals by filing a statutory cost bond on September 16, 1986. By October 30, 1986, Petitioner had filed a partial statement of facts prepared by Mr. Clifton Smith, one of three reporters who attended the trial of the case below. Petitioner had made satisfactory financial arrangements with this Court reporter, which enabled him to comply with the Rules of Appellate Procedure in this regard. The other two court reporters, Ms. Sharon Gray and Ms. Lydia Orozco, refused to make similar arrangements with Petitioner, and demanded that Petitioner make a $10,000

deposit with each of them before they would begin their work on the statement of facts, although they were properly requested by Petitioner to prepare their portion of the statement of facts in accordance with the Rules.

On November 25, 1986, Sharon Gray and Lydia Orozco, filed in the Court of Appeals a Motion to Increase Cost Bond. In their verified Motion, the court reporters stated that the statement of facts would be in excess of of 7,500 pages and that the reasonable and necessary cost to prepare a statement of facts of that size is $28,425.

On December 30, 1986, the Court of Appeals entered an Order which increased the amount of the Cost Bond on Appeal to the amount of $125,000, and ordered that the bond be filed on or before January 29,

1987. The December 30, 1986, Order included a bond amount for the attorney ad litem in the trial court, and the court reporter's bond. The time for compliance with the order was extended to March 2, 1987, and later to May 29, 1987, by Motions filed by Petitioner, claiming, among other things, that he was financially unable to comply with the cost bond order because of Bankruptcy and other financial direties. On July 30, 1987, pursuant to Petitioner's Third Motion for Extension of time, filed on June 15, 1987, the Court of Appeals modified its December 30, 1986, Order reducing the amount of the Cost Bond to the total sum of Twenty-eight Thousand Four Hundred and Twenty-five Dollars ($28,425.00). The Court also ordered that Petitioner file the additional cost bond on or before October

12, 1987. By order of November 5, 1987, the Court of Appeals extended the time to file the Cost Bond to December 30, 1987, at noon, with an indication that no extensions would be granted.

On December 30, 1987, Petitioner filed a Motion to abate the Court's cost bond order of July 30, 1987, because Petitioner, through his attorney, had reached a tentative agreement with the attorrney representing Ms. Sharon Gray and Ms. Lydia Orozco, for payment of the statement of facts. After filing the Motion to abate, Petitioner's counsel received a letter from Mr. William Ware, attorney for Ms. Gray, setting forth the proposed financial arrangements to obtain the statement of facts.

Upon Petitioner's motion to abate, the Court of Appeals entered an order on

January 14, 1988, which said:

> "This Court will rule on appellant's motion to abate the Court's cost bond order upon receipt of a copy of a signed and verified agreement between appellant, his attorney and the court reporters. In lieu of a copy of said agreement, the Court will accept affidavits of Sharon Gray and Lydia Orozco as to their acceptance of said agreement and an estimate of the length of the record and the time needed to file the statement of facts.
>
> It is ORDERED that a copy of such agreement or court reporters' affidavits in lieu thereof must be filed with this Court no later than 5:00 p.m., Tuesday, February 1, 1988." [emphasis supplied]

On February 1, 1988, Ms. Gray and Ms. Orozco, the proponents of the Motion to increase cost bond upon which this case was dismissed, filed in the Court of Appeals affidavits which acknowledged that

they had reached a tentative agreement with counsel for Petitioner to provide a transcription of their portions of the statement of facts. The agreements, which were to be drafted by Mr. Ware, had not reached Petitioner's attorney's office by February 1, 1988, and Petitioner's counsel flew to Houston and met with Mr. Ware, at his office at 8100 Gulf Freeway, Houston, Texas, with Petitioner on February 4, 1988. At that time the agreements which were subsequently submitted to the Court of Appeals [drafted by the attorney for Ms. Gray and Orozco] were executed by Petitioner's counsel, and Petitioner's counsel delivered the sum of $2,500 to Mr. Ware for Ms. Gray and Orozco, pursuant to those agreements. Under the terms of the agreement and the negotiations between Petitioner's counsel and Mr. Ware, Ms.

Gray and Ms. Orozco were then to file the affidavits in the Court of Appeals, which were required by the January 14, 1988, order, stating that agreement had been reached and their estimate of the time to complete the statement of facts. At the time of the delivery of the first $2,500.00 to Mr. Ware, Mr. Ware assured counsel for Petitioner that Ms. Gray and Ms. Orozco would comply with the Court's order. Neither Petitioner nor his attorney had any control over whether the affidavits would be filed, and at the time of the execution of the agreement and the tender of the first deposit thereunder, Petitioner and his attorney believed that the court reporters who had filed the motion to increase the cost bond would abide by their agreement and file the necessary affidavit.

It should also be noted that in addition to the "Contract", which was submitted to the Court of Appeals by Ms. Gray and Ms. Orozco, a "Release of Liability" [which was also drafted by counsel for Ms. Gray and Ms. Orozco] was executed by Petitioner's counsel.

On February 18, 1988, the Court of Appeals dismissed the appeal. At that time, counsel for Petitioner was unaware that Ms. Gray and Ms. Orozco had not fulfilled their portion of the agreement reached by filing the requisite affidavit and estimate of time for completing the Statement of Facts. Petitioner's counsel is now aware through discussions with attorney Ware, that an affidavit of some sort was filed by Ms. Gray as to the estimate of time, but counsel has not seen such affidavit. By the Court's dismissal

of this case, it is now apparent to Petitioner and his counsel that the court reporters who have obstructed Petitioner in his quest for a statement of facts of his trial, beginning in July, 1986, have breached their agreement with Petitioner and his counsel by not fulfilling the terms of the Court of Appeals' order directing them to file their affidavit of acceptance of the represented "tentative agreement" and an estimate of the time required to complete the statement of facts, and their agreement with Petitioner's counsel to comply with the order. This was done after Petitioner's counsel had delivered the sum of $2,500.00 to Mr. Ware, in trust for these court reporters. It is obvious that Ms. Gray and Ms. Orozco were not only seeking to obtain money from Petitioner, but to

obtain a release of liability from Petitioner for their conduct in obstructing Petitioner's appeal.

ARGUMENTS AND AUTHORITIES UNDER

POINT OF ERROR ONE

1. The two court reporters, as "officers of the court", filed their Motion to Increase Cost Bond on appeal in this case, which resulted in the Court of Appeals ultimately increasing the bond to the sum of $28,425.00. The order of dismissal is premised on Petitioner failing to post such bond. It is apparent from the record that Petitioner, through his counsel, had done everything required of him by these two court reporters to make satisfactory arrangements with them to provide a complete statement of facts. They have not fulfilled their promises to make this satisfaction known to the Court

of Appeals, and give the Court of Appeals a proper estimation of the time to complete the statement of facts. Petitioner should not be held to suffer by dismissal of his appeal.

2. The Court of Appeals increased the cost bond on Motion of Ms. Gray and Orozco under Rules 46 & 49, Texas Rules of Appellate Procedure, without hearing or regard to Petitioner's ability to comply with such an increased bond. The increased bond was done after the trial court had lost jurisdiction to increase same on hearing or application. Petitioner repeatedly filed in the Court of Appeals his verified statements of his financial inability to comply with the increased bond, and these statements went virtually unchallenged by the proponents of the motion. Rules 46 & 49, Texas Rules of

Appellate Procedure are unconstitutional on their face and as applied to Petitioner herein:

a. Rules 46 & 49, are violative of Art. I, ¶13, Texas Constitution, which provides in part:

> "...All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

In Dillingham v. Putnam, 109 Tex. 1, 14 S.W. 303 (1890), the Texas Supreme Court held a legislative act making the right of appeal depend on the giving of a supersedeas bond, without reference to the Petitioner's ability to pay, was unconstitutional as violative of the open courts provision of the Texas Constitution. See also, Nelson v. Krusen,

678 S.W.2d 918 (Tex. 1984). Rules 46 & 49, which allow for an increased cost bond on appeal by the appellate court, without regard to or provision for hearing Petitioner's financial ability to comply with the increased bond, deprive Petitioner of his right to appeal and a remedy by due course of law.

b. Rules 46 & 49, deny Petitioner his rights to due process of law and equal protection of law and are violative of Art. I, ¶¶ 3 & 19, Texas Constitution, because Petitioner was deprived of an opportunity to be heard on his inability to post the increased bond, whereas if such an affidavit is filed in the trial court, he is entitled to a hearing under Rule 41. Under Rules 46 and 49, he is not entitled to a hearing, yet he is being deprived of his right of review because of

failing to post the increased bond.

c. Rules 46 & 49 are violative of the Due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution because they arbitrarily exclude certain parties, including this Petitioner, from exercising the right of appeal without regard to ability to comply.

d. Rules 46 & 49 are violataive of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution because they do not offer each litigant, including this Petitioner, a fair opportunity to obtain an adjudication on the merits of his appeal.

e. Rules 46 & 49 are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. [emphasis supplied]

3. Petitioner made a prima facie showing of inability to comply with the cost bond order, and Petitioner is still in Bankruptcy proceedings. The movants have made no showing of his ability, and the cost bond order should be abated or rescinded, because Petitioner is being excluded from exercising his right and opportunity to obtain a fair adjudication of his appeal on the merits. [See, Evitts v. Lucey, 105 S.Ct. 830 (1985); Griffin v. Illinois, 76 S.Ct. 585 (1956).]

4. The Petitioner and the court reporters made satisfactory financial arrangements, which would dispense with the necessity of the increased cost bond, and the contract was in effect. The Court of Appeals' order of dismissal deprives the Petitioner of a fair opportunity to obtain an adjudication of his appeal on

the merits. ["Appellate review of trial court judgments disposing of the substantive rights of litigants is a valuable right and should not be denied when under a liberal interpretation of the Rules it is possible to give it...." Bay v. Mecom, 393 S.W.2d 819 (Tex. 1965). See also, Airco, Inc. v. Tijerina, 603 S.W.2d 785 (Tex. 1980); Pollak v. Metroplex Consumer Center, Inc., 722 S.W.2d 512 (Tex. App.-Dallas, 1986)]

5. The increased cost bond did not inure to Respondent, thus she lacks standing to move for dismissal on those grounds. No supersedeas has been posted in this case, thus Respondent's rights have been in no way prejudiced.

6. There are meritable arguments on appeal, which may require reversal, and this appeal is not frivolous. Two major

issues are now apparent from the record before the Court of Appeals [not meant to be all inclusive]:

a. Lack of counsel during critical portion of trial. The partial transcript which was ordered filed by the Court of Appeals shows that midway during the trial, counsel for Petitioner was forced to withdraw because of medical disability. The trial continued with Petitioner acting pro se. [See Partial Statement of Facts filed by Mr. Clifton Smith of trial proceedings of May 21, 1986, May 27, 28, 29 & 30, 1986.]

b. The amount of child support which was set [$17,500.00 per month] was done under Supreme Court standards which were later rescinded. The Court of Appeals on at least one previous occasion addressed this issue on Motion by Petitioner in

August, 1987, one Justice remarking that the amount was ridiculous, and the Court of Appeals abated the child support order on certain conditions.

PRAYER FOR RELIEF

WHEREFORE, for each of the reasons set forth herein, Petitioner prays that this Court reverse the judgment of the Court of Appeals dismissing Petitioner's appeal.

Petitioner prays for general relief.

Respectfully submitted,

JAMES M. MURPHY
State Bar # 14700800

P.O. Box 140809
Dallas, Texas 75214
214-745-1532

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all counsel of record, at their respective office addresses, by certified mail, return receipt requested, on this _____ day of April, 1988.

JAMES M. MURPHY

APPENDIX J

* * *

IN THE
SUPREME COURT OF TEXAS
AT AUSTIN

NO. C-7509

DANNY MICHAEL LINKOUS,
Petitioner,

v.

NANCY L. LINKOUS,
Respondent.

Entered: June 29, 1988

"Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

APPENDIX K

* * *

IN THE
SUPREME COURT OF TEXAS
AT AUSTIN

NO. C-7509

DANNY MICHAEL LINKOUS,
Petitioner,

v.

NANCY L. LINKOUS,
Respondent.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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Entered September 14, 1988.

* * * * * * * * *